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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1248

MULTARI EQUIPMENT CORPORATION AND SALVATORE MULTARI,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to captioned petition for a writ of certiorari.

Facts

At 1:00 a.m. February 9, 1969, a blizzard began, and by the time it ended two feet of snow had fallen on the City of Yonkers. The City did not have enough equipment to handle the emergency, so it hired independent contractors to assist. As a result of the claims made to the City by Multari Equipment Corporation and Salvatore Multari for work allegedly performed, both were indicted for the crimes of Attempted Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree and Offering a False Instrument for Filing in the First Degree.

Trial commenced February 24, 1972 before Honorable Timothy J. Sullivan and a jury. The People first called as witnesses four employees of the City of Yonkers who were involved in the snow removal crisis. Frank Salerno, Jr. was the snow coordinator and directed the removal of snow from February 9 to February 22 (R62-63). On February 10, 1969 private contractors, including the defendant, were contacted and immediately began work (R63, 65). Mr. Salerno did spot checks in the field and saw the defendant operating a loader as part of his assignment to clear the streets and plow the snow (R66, 67). There was no contract between the City and the private contractors prior to their employment, thus the contractors were to be paid at the green book rate based upon the tickets submitted at the end of the operation, which contained the equipment and the number of hours it worked (R641-65, 69-70). Mr. Salerno did not know how many pieces of equipment the defendant had on the street and, when the bills were submitted, assumed that the defendant, who had done prior work for the City, had submitted a correct claim (R68, 85, 80, 84).

Anthony Baiocco, an employee of the Department of Public Works, was assigned to check complaints against private contractors during the snow removal but, at that time, was not asked to check the defendant's equipment (R110-11). Sometime toward the spring he did inspect the defendant's equipment (R111) but was not permitted to testify to the result of that inspection (R112-118).

James Fay, a sanitation man, was assigned to spot check the equipment that was used by the defendant in the snow removal (R125-26). He didn't know one piece of equipment from another (R127), and didn't see any names on the equipment (R134) but, as he saw the defendant working a piece of machinery (R132) and the defendant stated he had the equipment he claimed (R133), Mr. Fay signed the tickets the defendant presented to him (R126, 129).

Lawrence Saltz was employed as a senior accountant in the Department of Public Works and as such was assigned to check the mathematical accuracy of the claims presented (R87). Letterhead invoices (exhibits 10-13, R89, 183-186 were received first and when the work tickets (exhibit 14, R90, 206) were received, the two were checked for mathematical accuracy (R90). (The discrepancies were cleared up in a telephone conversation with the defendant (R90-91)). Affidavit claim forms (exhibits 15-19, R97; 187-196) were then completed by the defendant and upon receipt by the City, Mr. Saltz checked them against the prior invoices and tickets for mathematical accuracy (R93). As everything appeared to be in order, the claims were submitted to the Commissioner of Public Works for approval (R93). The claims, which were submitted March 14, 1969 and approved June 18, 1969, were not paid (R96, 94, 99).

Harold Good, an employee of the New York State Commission of Investigation, was present on June 5, 1969 and June 11, 1969 when the defendant Salvatore Multari appeared before the Commission (R154-55). The defendant first appeared, pursuant to invitation, before Mr. Good, Albert Sohn, Richard Alleyene and Melvin Cutler at approximately 10:00 a.m., June 5, 1969 (R156-57). At that time the four men asked the defendant questions but, as there was no stenographer present, the questions were not taken down and the witness could not recall which of the four asked which specific question (R156-160). The witness was present at the proceedings and knew substantially what was asked (R157). The Court ruled, however, that the witness could not testify to what the defendant had stated to the members of the Commission unless he "could identify what particular person asked each particular question." (R161-62).

The People then made an offer of proof consisting of what the testimony of Mr. Good would have been and what the testimony of an accountant would have been, had he

been able to testify based upon the facts elicited from Mr. Good (R164-176). At the June 5, 1969 meeting, Mr. Multari described the equipment which he owned and that which he claimed he rented from outside subcontractors (R164). The defendant stated that he had no formal agreements with the subcontractors and that there had been no formal price (R165). At that time Mr. Multari could not name the men who operated the equipment, but when he returned on June 11, 1969, he named eleven people whom he claimed had worked for him during the snow removal (R165). Only two of those men had been paid by Multari (R165-66). Mr. Multari told the Commission that he had a list of the people who had worked for him and the total number of hours each had worked. He then stated that list plus the two men who had been paid, was a complete list of all the people who had worked for him (R166). That list (exhibit 29, R140, 197), prepared by the defendant, Salvatore Multari (R60-61), was submitted to the Commission on June 12, 1969 by Anthony Orriccio (R166). The total number of hours represented by the two men who had been paid and the names on the list, which the defendant claimed was complete, was 1,152 (R166).

Had the testimony that the list was complete been admitted, an accountant would have been called to give his analysis of the claim for 3,308 hours presented by the defendant (R167). The accountant would have given full credit to the defendant's statement to the Commission, that he and his partner worked steadily on the snow removal and that they worked twenty-four hours a day for thirteen days (R167). The accountant would then have testified that the claim exceeded the hours actually worked (R168).

Without the testimony of Mr. Good and the accountant, who could not testify without that basis, the People were forced to rest (R176). A trial order of dismissal pursuant to Section 290.10 of the Criminal Procedure Law was granted (R176).

The Appellate Division reversed that ruling finding that the testimony objected to was admissible and that the evidence presented coupled with that contained in the offer of proof would be sufficient to make out a legally sufficient case. The Court of Appeals denied review.

POINT I

The judgment of the State Court is not final within the meaning of 28 USC 1257.

The State appealed from the trial court's dismissal of the indictment on the sole ground that the court erroneously refused to allow the admission of certain testimony, thus preventing the State from proving a legally sufficient case. Neither the State nor the petitioner herein raised any issue as to the constitutionality of the right of the People to appeal or the Appellate Division to order a new trial as it related either to the issue of double jeopardy or the sufficiency of the testimony to permit cross examination. The Appellate Division, in reversing the trial court order of dismissal, reinstating the indictment and remanding for a new trial passed only on the issue of the admissibility of certain evidence and whether or not the evidence previously given, coupled with the evidence set forth in the People's offer of proof would be sufficient to make out a legally sufficient case (40 AD 2d 836, 337 NYS 2d 295).[1]

As the order of the Appellate Division reversing the order of the trial court and remanding the case for a new

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[1] There can be no question that the issue of double jeopardy can be litigated in the State courts even prior to a second trial by means of an Article 78 proceeding in the nature or prohibition, a collateral proceeding which would result in an appealable final judgment (7801, CPLR; *Kraemer* v. *County Court*, 6 NY 2d 363, 189 NYS 2d 878, 160 NE 2d 633). Of course, whether or not the defendant was prevented from cross examining a witness may only be determined from an examination of the testimony after trial.

trial is not final judgment, under 28 USC 1257 (*Gospel Army* v. *Los Angeles,* 331 US 543, 91 L.Ed. 1662, 67 S.Ct. 1428), this court should refuse to consider the issue, as any consideration thereof would be an intervention in a State Court proceeding in a manner in which the Federal Courts will not intervene (*Younger* v. *Harris,* 401 US 37, 27 L.Ed. 2d 669; 91 S.Ct. 746; *Samuels* v. *Mackell,* 401 US 66, 27 L.Ed. 2d 688, 91 S.Ct. 764; *Boyle* v. *Landry,* 401 US 77, 27 L.Ed. 696, 91 S.Ct. 758).

POINT II

An appeal by the State from a trial order of dismissal is constitutionally permissible.

At the end of the People's case, the defendant may either move for a trial order of dismissal, contending that the People have failed to prove a legally sufficient case or waive that right, present his defense and allow the case to proceed to verdict. If a trial order of dismissal is granted and the People are successful on appeal, i.e., the court finds that excluded evidence was improperly excluded and had it been admitted the People would have proven a legally sufficient case or if no evidence was improperly excluded that the People did in fact prove a legally sufficient case, the Appellate Division may reverse the trial court's order of dismissal and remand for a new trial. On remand the defendant stands in the same position as he was on the original trial, namely the People must prove his guilt beyond a reasonable doubt and he cannot be convicted unless the jury so finds. There can in no event be a summary reversal and a finding of guilt by the Appellate Division. Of course, if the People are not successful on their appeal from the trial order of dismissal, the order of the Appellate Division is as a matter of State law final, as no new trial can be had. If the defendant elects to proceed to a jury verdict and not move for a trial order of dismissal and is acquitted by that jury there can of course

be no appeal by the State. If the defendant is convicted and the evidence was sufficient to sustain the conviction, the court on appeal will affirm the conviction. If, however, the evidence was legally insufficient, the Appellate Division must dismiss.

If the evidence was legally insufficient the charges must be dismissed be it by trial order of dismissal or on appeal from judgment. If, however, the evidence presented was legally sufficient, the defendant's guilt or innocence must be determined by the jury be it on the original trial or on remand after a wrongful dismissal on the law by the trial court. The defendant's right to have his guilt proved beyond a reasonable doubt and such guilt or lack thereof determined by the jury is in either event preserved and in either event only once put before a jury for its consideration.

The effect of a motion by a defendant for a trial order of dismissal is the same as a motion for a mistrial. In either event, the defendant elects to arrest the trial, waiving a jury determination and any claim of double jeopardy on a new trial.

POINT III

The admissions made by the defendant to the State Investigations Commission were admissible and had they been admitted a legally sufficient case would have been proven.

It is elementary that any admission by the defendant is admissible against him in a criminal prosecution,[2] (*Wigmore on Evidence,* § 1050), and that "any act or declaration of the accused inconsistent with his innocence is admissible against him as an admission" (*Richardson on Evidence,* § 209), even if the admission was in the defend-

[2] We are not here concered with the "Miranda" or broader voluntariness issues.

ant's interest at the time it was made, so long as it was against his interest at the time of trial. (*Richardson on Evidence,* § 289; *Wigmore on Evidence,* § 1048). An oral admission or statement may be testified to by onyone who heard it (*McRorie* v. *Monroe,* 203 NY 426, 96 NE 724; *Gangi* v. *Fradus,* 227 NY 452, 125 NE 677; *People* v. *Miro,* 151 M. 164, 271 NYS 341).

We then come to the issue which was before the court in the instant case, may a witness, who was present when questions were asked and remembers the substance of the questions but not the exact questions or by whom they were asked, testify to admissions made by the defendant?

In *McRorie* v. *Monroe, supra,* the Court of Appeals had occasion to consider this precise issue. There a witness was called by the defendant to testify as to what he had heard the plaintiff say on a former trial. The witness first testified that he did not remember specific questions and then attempted to state what he had heard the plaintiff testify to. An objection to this testimony was sustained (Case and exceptions, 87-88). The Court in reversing the judgment stated, "The learned trial judge refused to allow the defendant to prove by this witness what he heard the plaintiff testify on the former trial; and exceptions were duly taken to his rulings in this respect. These rulings were plainly erroneous." Clearly a witness may testify to admissions made by the defendant even though he is unable to remember the questions.

The admissions of the defendant were admissible and the fact that the witness could not remember who asked the questions or the exact words used, went not to the admissibility of the admissions, but solely to the weight to be given to them (*Gangi* v. *Fradus, supra; Elliott on Evidence,* § 242). Thus, the trial court erred in holding that the statements were inadmissible.[3]

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[3]While not before the trial court for a ruling on admissibility, it might be appropriate to note that a memorandum of the results

(footnote continued on following page)

If Mr. Good had been allowed to testify, it would have been established by the defendant's admissions that other than the work performed by him and his partner, the total number of man hours that he supplied to the City was 1,152. The accountant would have testified that assuming the defendant and his partner worked 24 hours a day for the entire thirteen days (with appropriate overtime), the total number of hours accounted for was substantially less than those shown on the claim submitted by the defendant and therefore that he had attempted to overcharge the City. The accountant would have testified to the excessiveness of the claim based upon the price per hour and the excessive number of hours claimed. As the claim was approved by the City, but not paid, there would have been legally sufficient proof of the defendant's guilt of the crime of Attempted Grand Larceny in the Second Degree.

As the claim submitted to the City by the defendant justified the overcharge claimed, the proof would have been legally sufficient to prove the crime of Offering a False Instrument for Filing in the First Degree.

It was established on trial that the claim presented to the City and that reflected on the tickets maintained by the defendant as business records was the same. Therefore, the claim having been falsified, the business records were also falsified and there was legally sufficient evidence of the crime of Falsifying Business Records in the First Degree.

(footnote continued from preceding page)

of each interview was made (R159, exhibits 27 and 28, R176, 198-204). These detail memoranda made (and approved) by Mr. Good from notes taken by him at the time of the interview may well have been admissible, with a proper foundation, under 4518 CPLR. However, even if admissible, under the ruling of the trial court would not have been sufficient as they did not contain the exact questions asked or the identity of the person who asked any specific question.

The ruling of the court on a matter of State Law having been clearly erroneous and the evidence which would have been offered had the People not erroneously been prohibited therefrom, having been clearly enough to prove a legally sufficient case, the People were properly offered an opportunity to appeal from the interlocutory determination and upon reversal of that determination to present their case in toto to a jury (Compare: *Illinois* v. *Somerville*, —— US ——, —+— L.Ed. ——, S.Ct. ——, 41 LW 4319).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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